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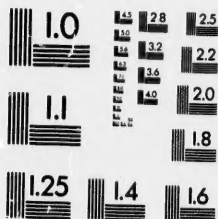
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PROVINCE OF LOWER-CANADA.

COURT of APPEALS
April Session, 1814.

JAMES McCALLUM,

Appella

vs.

THOMAS DELANO
AND
ANDREWS BURNAM,

Respondent

RESPONDENTS' CASE.

PROVINCE OF LOWER-CANADA.

COURT OF APPEALS.

JAMES McCALLUM.....APPELLANT.

VS.

THOMAS DELANO AND ANDREWS BURNAM.....RESPONDENTS.

IN APPEAL from a Judgment of Dismissal in the Court of King's Bench for the District of Quebec, in a Cause there, in which the abovenamed Appellant, James McCallum, was the Plaintiff, and the abovenamed Thomas Delano and Andrews Burnam, were the Defendants.

RESPONDENTS' CASE.

THIS was an Action brought in the Court of King's Bench at Quebec, by the abovenamed Appellant, as Assignee of a Lumber Contract which had been entered into by the abovenamed Respondents with one Jackson, and which Contract had afterwards been assigned by Jackson to the said Appellant.

The Declaration in the Court below, dated 17th July, 1811, states, That on the 2d day of November, 1810, at the City of Quebec, it was covenanted and agreed, by and between the said Thomas Delano and Andrews Burnam, of the one part, and William Jackson, of the City of Quebec aforesaid, Merchant, of the other part, and the said Thomas Delano and Andrews Burnam, did acknowledge and confess to have fold, assigned, and turned over unto the said William Jackson, certain quantities of Norway Pine Timber, Norway Pine Spars, and White Oak Timber—viz:—25,000 feet of good Norway Pine Timber, of certain dimensions, and at a certain price per foot, therein mentioned, and 10,000 feet of good White Oak Timber, of certain dimensions, and at a certain price per foot, therein also mentioned, to be in every respect found and merchantable, and to be delivered at Sillery Cove on or before the 15th of June, to the said William Jackson, or his Assigns, subject to the laws and customs made and provided for the culling of Timber at the Port of Quebec, and the said Thomas Delano and Andrews Burnam, did further acknowledge and confess to have fold, assigned and turned over, unto the said William Jackson, certain large quantities of Norway Pine Spars and White Oak Timber, to be delivered as therein follows—viz:—100 Norway Pine Spars, of various dimensions, and at certain prices, according to such dimensions, therein specified, and also 10,000 feet of good Norway Pine Timber, of certain other dimensions, and at a certain other price, therein specified, and 8000 feet of good merchantable White Oak Timber, also of certain other dimensions, and at a certain other price, therein specified, to be delivered on or before the month of June, then next ensuing, to the said William Jackson, or his Agent, at Three-Rivers, subject to the Laws, Usages, Rules and Regulations, made and provided for the Culling of Timber at the said Port of Three-Rivers—Which said Contract is thereby declared to have been made for and in consideration of the aforesaid prices, the amount whereof was to become due and payable as follows—viz:—The sum of £500 Currency paid and delivered to the said Thomas Delano and Andrews Burnam, by the said William Jackson, before the execution of the said Agreement, and whereof they did thereby discharge the said William Jackson:—And further that the said William Jackson did promise to pay or cause to be paid to the said Thomas Delano and Andrews Burnam, the further Sum of £750 on or before the month of January (in the said Declaration stated to have been at the Time of the making of the said Agreement, then next, and to have been at the Time of the exhibiting of the said Declaration, then past) and the Balance remaining upon the abovementioned Timber, after the delivery thereof.

That by a certain Notarial Act, bearing date at Montreal, the 12th day of June, then last past, (1811) executed before Gray and Baron, Notaries Public of the same place, the said William Jackson, for the causes therein stated, did assign, cede, and turn over, unto the said James McCallum, the aforesaid Contract and Agreement entered into by the said William Jackson, of the one part, and the said Thomas Delano and Andrews Burnam, on the other part, and all and every the Timber to be delivered in pursuance thereof, and all and every the Sum or Sums of Money by him the said William Jackson advanced and paid to the said Thomas Delano and Andrews Burnam, and generally all and every the right, title, interest, claim and demand, which he the said Wil-

liam Jackson, by reason of the abovementioned Agreement, might have or be entitled to—of all which premises the said Thomas Delano and Andrews Burnam, afterwards, to wit, on the 13th July, then instant (1811) at Quebec aforesaid, had notice.

That although the said William Jackson did, on his part, pay or cause to be paid to the said Thomas Delano and Andrews Burnam, the Sum of £780 Currency, and upwards, on account and in advance of the said Contract, and was at all times ready to pay them the remainder of the price therein mentioned, yet the said Thomas Delano and Andrews Burnam had not delivered, or caused to be delivered, the whole or any part of the Timber and Spars as abovementioned, although the time of delivery of the same was then past, but that, on the contrary, they, the said Thomas Delano and Andrews Burnam, had wholly failed to deliver the same, although required so to do.

In the said Declaration there then follow three other Counts, in *indebitatus assumpsit*, for Money, paid, laid out and expended for, and lent and advanced to the Defendants by the Plaintiff, and Money had and received by the Defendants to the use of the Plaintiff, and concluding for damages for the non-performance of the promises and undertakings of the Defendants in that behalf, to the amount of £750 Currency.

To this Declaration the Respondents, being the Defendants below, pleaded, Firstly; a *défense au fonds en fait*, N^o. 3 in the Record;—and Secondly; a *perpetual exception péremptoire en droit*, N^o. 4 in the Record;—setting forth,—that they, the said Thomas Delano and Andrews Burnam, ever since the making of the Contract or Agreement of the second day of November, 1810, in the Declaration of the said James McCallum, in this Cause filed, mentioned and set forth, had been ready and willing to perform, fulfil and execute, and should and would in fact have punctually and duly performed, fulfilled and executed, all and every the matters and things whatsoever therein or thereby covenanted, stipulated and agreed to be performed, fulfilled and executed, on the part or behalf of them or either of them, if the said William Jackson, or any other person or persons on his behalf, antecedent to the assignment of the said Contract in the said Declaration mentioned, or the said James McCallum, or any other person or persons acting in his behalf, subsequent to the said Assignment, had on their respective parts and behalves, performed, fulfilled or executed, the several matters and things on their respective parts and behalves to be performed, fulfilled or executed, but that neither the said William Jackson, nor the said James McCallum, or any person or persons on the part of them, or either of them, had performed, fulfilled or executed, the several matters and things thereby covenanted, stipulated and agreed to be performed, fulfilled and executed, on the part and behalf of the said William Jackson;—And particularly that the said William Jackson did not pay or cause to be paid unto the said Thomas Delano and Andrews Burnam, the Sum of £750 Current Money of Quebec, on or before the month of January next ensuing the date of the said Contract or Agreement of the second day of November, 1810, but therein failed and made default, and on the contrary thereof, that a large Sum of Money, to wit, the Sum of £450 Current Money aforesaid, part and parcel of the said last mentioned Sum of £750, remained long after the said last mentioned month of January, and the said Thomas Delano and Andrews Burnam, by their said *perpetual exception péremptoire en droit*, further allege, That the said Sum of £450, part and parcel of the said last mentioned Sum of £750, so remaining due to them as aforesaid, P. Lukin and William Delisle, Notaries Public duly admitted and sworn for the said Province of Lower-Canada, at the request of the said Andrews Burnam, acting as well for himself as for the said Thomas Delano, on the 15th day of April, in the Year of our Lord 1811, and before the said Assignment of the said Contract or Agreement by the said William Jackson, at the said City of Montreal aforesaid, speaking to the said William Jackson, did declare unto the said William Jackson the said several last mentioned premises, and did then and there require him the said William Jackson, to pay unto the said Andrews Burnam and the said Thomas Delano, the said Sum of £450 Current Money aforesaid, so remaining due of the said last mentioned Sum of £750, at the same time offering to grant a Receipt therefor in his own name and in the name of the said Thomas Delano, whereupon the said William Jackson gave the said Notaries for answer, that he could not pay it at the *then present*, and which said answer not being satisfactory, they the said Notaries, at the request aforesaid, did in due form of Law, Protest against the said William Jackson, and all others whom it might concern, First, for the Sum of £2000 Penalty incurred by the said William Jackson, as expressed in the said Contract or Agreement of the 2d day of November, 1810, and further, for all Costs, Damages and Interests, suffered and to be suffered for and by reason of the Breach of Covenant on the part of the said William Jackson, and of the premises, a Copy of which Protest in that behalf had been delivered to the said William Jackson, that he might not pretend ignorance of the premises, As by the said Notarial Act or Instrument of Protest in that behalf, relation being thereunto had, might: and would more fully and at large appear.—And the said Thomas Delano and Andrews Burnam, by the said *perpetual exception péremptoire en droit*, alleged, that the said Sum of £450 still remained and was wholly due and unpaid to them the said Thomas Delano and Andrews Burnam, or either of them; by reason of which said last mentioned premises, and of which said breach, neglect and non-performance of the Covenants, Conditions, Stipulations and Agreements, in the said Contract of the 2d day of November, 1810, mentioned, contained and expressed on the part and behalf of the said William Jackson, previous to the said Assignment, and of the said James McCallum, subsequent thereto, to be performed, fulfilled and executed, it became and was impracticable for them the said Thomas Delano and Andrews Burnam, to perform, fulfil

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and execute the several matters and things which would otherwise have been to be by them performed, fulfilled and executed, and which they would otherwise have been ready and willing to have performed, fulfilled and executed, and would in fact have well and sufficiently performed, fulfilled and executed, and they did accordingly in consequence of such breach, neglect and non-performance, on the part and behalf of the said William Jackson and James McCallum, as is herein before stated and set forth, and for no other reason whatever, from and after such breach, neglect and non-performance, decline and refuse further to perform, fulfil and execute the said Contract or Agreement on their parts and behalves, as it was lawful for them to do.

The Defendants also put in, Thirdly, a Declaration of Incidental Cross Demande, for the Penalty stipulated in the Contract, and Damages, but which, as the demand in chief only is appealed, it is unnecessary here further to particularize.

To the abovementioned *perpetual exception peremptoire en droit*, the Plaintiff filed a General Answer, and thereupon issue was joined.

After having taken the Evidence between the Parties, which will be found on the Record, the Action was upon the hearing *en droit*, dismissed with Costs, and against this dismissal the Plaintiff in the Court below has brought the present Appeal.

The REASONS OF APPEAL are quite general—stating merely,—1stly. That Judgment is rendered against the Appellant, whereas it ought to have been rendered for him—2dly. That his Declaration was true and well founded, and that the Conclusions thereof ought to have been granted—3rdly. That the *perpetual exception peremptoire en droit*, of the Defendants in the Court below, was insufficient,—and, 4thly. That the Judgment of the Court below is contrary to Law and Evidence.

To which Reasons the Respondents have filed a General Answer.

The MERITS of the Case, as appearing from the Evidence, are as follows:

The Respondents are Lumber Dealers, dealing in the usual manner, by undertaking to bring down Timber to Quebec or Three-Rivers, at certain prices, in consideration of advances to be previously made to them for that purpose, without which they are of course unable to do it, as they are under the necessity of paying for the Timber in the Upper Country, as well as the very considerable Expenses attending the Transportation of it down.

They had been induced, accordingly, to enter into the Contract of the 2d of November, 1810, on this consideration, and having received the £500 which is therein mentioned, as having been paid down at the time of its execution, they, on their parts, immediately entered into such Contracts with Mr. Biglow, of Ticonderoga, a landed Proprietor and Magistrate there, Mr. Roley, Mr. Landers, William Cook, Esqr. Mr. Taylor, Mr. Denefmore, Messrs. Jonathan and Lemuel Barlow, and other persons, as were necessary, and would have been fully sufficient to have enabled them to have completed their Contract with Jackson. All these Contracts, however, were made, as is usual, with the stipulation that they were to become void, if the pecuniary advances which they had thereby stipulated to make, were not, in fact, so made; and which could only be done with the money which Jackson was to furnish pursuant to the Contract of the 2d November, 1810.

It appears, that both the Respondents, went several times to Montreal, between the first of January and the middle of April, for the purpose of obtaining payment of the £750 which was stipulated by the Contract, 2d Nov. 1810, to be paid in the said month of January, but without effect, and that they, in consequence, protested against Jackson, on the 15th of April, for the £2000 penalty mentioned in the Contract, to which Protest he gave for Answer, that he could not pay the money. (See N^o. 8, in the Record.) It appears, also, that Jackson had, in fact, become utterly insolvent, and had been imprisoned at Montreal, and that, in consequence of the non-payment of this Money, the Respondents became unable to perform their Engagements with the several persons with whom they had Contracted for the purpose of fulfilling this Contract.

That such of the persons with whom they had contracted, as had not already delivered the Timber, refused so to do;—that the portions which had been delivered, could not be got over the Rapids, for want of money to pay the Hands and Pilots;—that Ten or Twelve Thousand Feet of Square Norway Pine were left up the River Senac, of which a part was destroyed by fire;—and that the Respondents were not only prevented from performing this Contract by the Insolvency of Jackson, but subjected to incalculable loss and inconvenience in every respect.—(See the Evidence of Messrs. Beglow and Turrill, Hill and Casey.)

It appears that James McCallum, the Appellant in this Cause, being a Creditor of Jackson's, took an Assignment of the Contract between him and the Respondents, on the 12th June, 1811, in compensation of the Debt due to him from Jackson, [See N^o. 2, in the Record] and it appears that the Assignment must have been taken by McCallum with a full knowledge that the original Contract had been broken by Jackson, it being stated on the face of the Assignment itself.

Under these Circumstances, it was contended by the Defendants in the Court below, that no Action could be maintained by McCallum, the Assignee of the Contract, under any System of

Jurisprudence known in this Country;—that an Assignee of such a Covenant, could not, by the Law of England, have maintained any Action at all; and that a *Cessionnaire* of a Contract, and still less a *Cessionnaire de droits litigieux*, (as was the Case here at the Time of the Assignment from Jackson to McCallum) could not stand in a better Situation than the original Party with whom the Contract had been made;—and still more especially where it could not but appear to the Assignee or *Cessionnaire*, that the Contract had, in fact, been previously broken by the very person from whom he was about to take the Assignment.

The simple facts, as appears upon the face of the whole of the Pleadings and Evidence, will be found to be as follows:—

That the Respondents, Delano and Burnam, had entered into a Contract with one Jackson, for the sale of some Lumber, part to be delivered at Quebec, and part at Three-Rivers, on condition of his paying them certain Sums of Money, at certain stated Periods: this being essentially necessary to enable them to procure it, and bring it down to those Places;—which payments Jackson had, accordingly, covenanted to make, under a penalty of £2000.

That Jackson himself failed in these Payments, and was, accordingly, Protested against and put *en demeure* with regard to the non-payment of these Advances.

That having so failed in the Payment of these Advances, and having been so put *en demeure*, and the performance of the Contract on the part of Delano and Burnam, having been thus rendered impossible by the Insolvency of Jackson, he could, of course, make nothing at all of any thing like an Action on the Contract.

That notwithstanding all these circumstances, it was conceived, afterwards, by Mr. McCallum, that he might make something of the thing in the way of speculation, by taking an Assignment of this broken Contract, (notwithstanding its being thus protested against,) and bringing an Action on it against Delano and Burnam.

Mr. McCallum, the present Appellant, is no Lawyer, and the Court below has already told him so, by stating to him, that he could not, at any rate, place himself in a better situation than that in which Mr. Jackson, from whom he had taken the Assignment, stood at the Time when the Assignment was made, and the *Transport* signified pursuant to the 108th Art. of the *Coutume de Paris*,—and that as Jackson could clearly have maintained no Action at this time, neither could Mr. McCallum as Assignee of the Contract.

Mr. McCallum insists, however, that notwithstanding all that the Rules of Law, and all that the Court of King's Bench, and all that the Counsel on both sides, may or can say, upon the Subject, the Thing is worth the Trial;—and upon this Ground, therefore, it is submitted, in pursuance of the original Speculation, to the Honourable Court of Appeals:—this Gentleman never considering it as a prudent measure to stop in any Speculation, which may, by any possibility, become a profitable one, unless he shall find himself obliged so to do.

QUEBEC, 26th April, 1814.

Sketcher
Counsel for the Respondents.

